

BEFORE THE  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
WASHINGTON, D.C.

*In re*

DETERMINATION OF ROYALTY  
RATES AND TERMS FOR  
EPHEMERAL RECORDING AND  
DIGITAL PERFORMANCE OF SOUND  
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR  
(2016-2020)

SOUNDEXCHANGE'S MOTION TO STRIKE "REPLY" BRIEFS IN SUPPORT OF  
iHEARTMEDIA'S MOTION FILED BY NATIONAL ASSOCIATION OF  
BROADCASTERS AND SIRIUS XM

SoundExchange, Inc. ("SoundExchange") respectfully requests that the Copyright Royalty Board Judges ("Judges") strike the "reply" briefs filed by the National Association of Broadcasters ("NAB") and Sirius XM Radio Inc. ("Sirius") in support of iHeartMedia's Motion to Compel SoundExchange to Produce Documents in Response to Discovery Requests ("iHeart's Motion"). NAB and Sirius were not parties to iHeart's Motion, and SoundExchange's opposition to iHeart's Motion did not address any of NAB's and Sirius's brand new arguments and requested relief for the simple reason that NAB and Sirius never made these arguments or requested this relief in a motion, as the rules require. These "reply" briefs are a classic sandbag to which SoundExchange has had no opportunity to respond. If NAB and Sirius want to file motions to compel raising new arguments and seeking different forms of relief, they can do so in accordance with the governing regulations. SoundExchange respectfully requests that the Judges strike them.

## BACKGROUND

NAB, Sirius, Pandora Media, Inc. (“Pandora”), and iHeartMedia Inc. (“iHeart”) (collectively, the “Services”) have coordinated their efforts throughout the proceeding, including discovery. The Services served joint requests for production of documents. *See* Declaration of Rose Leda Ehler (“Ehler Decl.”) Ex A at 1. NAB and Sirius, along with Pandora, joined iHeart’s meet-and-confer letter dated November 11, 2014. *Id.* Ex. B at 4. Counsel for NAB, Sirius, Pandora and iHeart were on the meet-and-confer conference call on November 12, 2014. *Id.* ¶ 5. Counsel for the Services have consistently joined one another’s meet-and-confer correspondence and participated jointly in meet-and-confer discussions, including in response to SoundExchange’s meet-and-confers directed to individual Services. *Id.* ¶¶ 7-8, Ex. D.

*NAB’s “Reply.”* iHeart filed its Motion on November 14, 2014. iHeart’s Motion sought internal Warner Music Group documents related to its agreement with iHeart (not relevant here) and surveys, studies and the like regarding the promotional effect of statutorily licensed webcasting services. NAB did not join in iHeart’s Motion, nor did it file a separate motion of its own requesting comparable relief. In accordance with the Rules, SoundExchange filed its Opposition on November 21, 2014, responding exclusively to iHeart’s arguments and requested relief.

On November 26, 2014, NAB filed its “reply” in support of a motion it never made. NAB’s “reply” raised new arguments that iHeart did not make, and SoundExchange did not address, including (1) that promotional efforts targeting terrestrial *necessarily* must be “promotion” for statutorily licensed webcasting whenever and wherever the terrestrial broadcaster makes internet simulcasts; (2) that certain statements by Mr. Harleston and Mr. Kooker regarding *expenditures* make all documents related to promotional efforts from the individual promotion departments discoverable; and (3) that SoundExchange purportedly agreed

to produce an additional category of documents that relate *exclusively* to terrestrial radio. NAB is wrong on all of these contentions. If and when NAB files a proper motion making these arguments, SoundExchange will fully respond to all of these claims.<sup>1</sup>

NAB further requests additional relief not requested by iHeart including (1) that iHeart's Motion should resolve NAB's separate and specific dispute as it relates to an additional category of documents—promotional plans related exclusively to terrestrial radio; and (2) that the Judges should go beyond the relief requested by iHeart and “compel SoundExchange to produce documents . . . that (i) discuss record label strategy in promoting recordings to radio broadcasters; (ii) report to label or company management about the justification for or effect of such promotion; or (iii) analyze the effects of such promotion.” NAB Reply at 3, 11, 12.

*Sirius's “Reply.”* The week after iHeart filed its Motion, Sirius and Pandora filed a *separate* Motion, noting that they joined in iHeart's Motion. Sirius and Pandora added to their “joinder” 12 additional document requests related to webcasting's substitutional effect—an issue not raised by iHeart's Motion, which focused on *promotion*. See Sirius XM Radio Inc. and Pandora Media, Inc.'s Motion to Compel SoundExchange to Provide All Documents Responsive to Requests for Production Related to Substitution at 1-2. SoundExchange responded to Sirius and Pandora's arguments in its Opposition filed on November 25, 2014 and expected that Sirius and Pandora would file a reply brief in support of its motion on or before the due date—December 2, 2014. Sirius nonetheless submitted a reply to *iHeart's Motion* raising a new issue not even raised in the discovery requests—promotion to satellite radio (referenced in the reply as

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<sup>1</sup> To take just one example, NAB is flatly wrong that SoundExchange agreed to produce documents relating exclusively to terrestrial radio. SoundExchange plainly stated that “Documents related *only* to terrestrial radio are not directly related to SoundExchange's written direct statement” and that SoundExchange “will not look separately for” such documents. Ehler Decl. Ex. C at 2.

a “statutorily-licensed digital music service[.]”) as opposed to webcasters. Sirius Reply at 3. Sirius makes no effort to explain why promotional efforts targeting satellite airplay also target plays on Sirius’s webcasting service. Sirius further requested relief not requested by iHeart—“*all documents* regarding the promotional effect of webcasting services, including those documents found within the promotion departments of the subsidiary record labels” and a timeframe of only three days from the Judges’ Order. *Id.* at 4 (emphasis added).

### **ARGUMENT**

#### **I. NAB AND SIRIUS RAISE NEW ISSUES FOR THE FIRST TIME IN REPLY BRIEFS, DENYING SOUNDEXCHANGE THE OPPORTUNITY TO RESPOND**

Principles of fundamental fairness, due process, and due respect for procedure all support the rejection of arguments that a moving party makes for the first time in reply. “As a general matter, it is improper for a party to raise new arguments in a reply brief because it deprives the opposing party of an opportunity to respond to them, and courts may disregard any such arguments.” *Loumiet v. United States*, No. CV 12-1130 (CKK), 2014 WL 4100111, at \*5 (D.D.C. Aug. 21, 2014) (citing *Performance Contracting, Inc. v. Rapid Response Const., Inc.*, 267 F.R.D. 422, 425 (D.D.C. 2010)). Such arguments are “untimely” and should not be entertained. *Id.*; see also *Payne v. Dist. of Columbia*, 4 F. Supp. 3d 80, 88 (D.D.C. 2013) (“Arguments raised for the first time in reply briefs are not considered.”) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008)); *Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir.1991)).

The replies filed by NAB and Sirius further subvert these principles because neither of these parties filed a motion making these argument in support of the issues that they now seek to address in the first instance—the replies are the first time these parties have unveiled these arguments. Allowing parties that did not file the original motion to come in with post-opposition

replies smacks of unfairness and creates a raft of problems for the orderly conduct of this proceeding. The practice discourages parties from resolving discovery disputes and impairs their ability to do so since it is unclear what participants must agree to resolve a motion. It also creates ambiguity around what issues the parties are requesting the Judges decide and invites further disputes about the scope of any orders issued by the Judges.<sup>2</sup> It encourages procedural gamesmanship, whereby a group of participants on one side can participate collectively in discovery requests and meet-and-confers, wait for one of their number to file a motion and see it opposed, and then jump in post-opposition with “replies” that make new arguments and seek to broaden the requested relief. And, of course, the practice prejudices the opposing party’s ability to respond to arguments that are raised in moving target fashion.

The Judges should strike the replies.

**A. NAB’s Reply Improperly Raises New Arguments and Expands the Request for Relief**

As discussed above, NAB’s “reply” raises at least three new arguments not raised by iHeart’s Motion, and requests several forms of additional relief. NAB does not explain *why* it should be permitted an exception to the Rules requiring that new arguments and requests seeking different forms of relief be made through a separate motion to compel except to suggest that it is entitled to file its improper reply to “address an argument raised by SoundExchange in its November 21, 2014 Opposition to the Motion” because that “argument directly affects NAB’s interest in this case, which focuses on its members’ Internet simulcasts.” NAB Reply at 1. This

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<sup>2</sup> For instance, Sirius seeks a deadline much more onerous than that sought by iHeart. Sirius seeks a deadline of “three business days of the Judges’ order,” Sirius Reply at 4, as compared to an ordering requiring productions of documents “promptly, with documents from Mr. Walk’s files produced by December 10,” iHeart Reply at 11. Not even Sirius and Pandora’s Motion included such an onerous timeframe. *See* Sirius and Pandora’s Motion at 11.

is not the standard, and if it were, *every* opposition would trigger a right for *every* Service to file a reply.

Furthermore, NAB had notice of SoundExchange's position that documents related to terrestrial radio are not "directly related" to its written direct testimony as of the exact same date as iHeart. SoundExchange clearly stated: "Documents related *only* to terrestrial radio are not directly related to SoundExchange's written direct statement" and that SoundExchange "will not look separately for" such documents. Ehler Decl. Ex. C at 2. The very email that NAB attaches to its motion explains that SoundExchange is reiterating a position previously made: "*As we have said previously*, and will reiterate in our filed opposition, documents relating exclusively to promotion through terrestrial radio are not 'directly related' to SoundExchange's written direct statement." Reply Ex. B at 1 (emphasis added).

NAB could have filed its own motion to compel at the same time iHeart did. It could have filed a separate motion a few days later raising these arguments and requests for relief as Sirius and Pandora did. NAB could file a procedurally proper motion on November 26, 2014 or even now. NAB cannot, however, hijack the process with a "reply" to which SoundExchange has no right to respond.<sup>3</sup>

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<sup>3</sup> If given the opportunity to respond, SoundExchange would make clear that NAB's position in discovery is entirely inconsistent with the burden it now seeks to enforce. Not only has it produced a meager 319 documents in response to 34 document requests, it has taken the position that it is not under an obligation to search its witnesses' companies for responsive documents because such documents are not in its possession, custody, and control. Ehler Decl. ¶ 9; *see also* Ex. E at 5 ("Except as may otherwise be specified, NAB will search for and produce responsive documents located only within the possession, custody, and control of NAB from NAB employees who are reasonably likely to have responsive documents that are directly related to NAB's written direct statement."). Rather than file a motion to compel, to which SoundExchange could present this argument in response, NAB has decided to cloak its new arguments and new requests for relief as a "reply"—they are not.

**B. Sirius's Reply Improperly Raises New Arguments and Expands the Request for Relief**

Sirius's reply is similarly improper because it, for the first time, argues that promotion *to satellite radio services* should be included in the Judges' consideration of iHeart's Motion. Sirius does not even attempt to tie the promotion it references, which is targeted as Sirius's satellite radio service, to its internet webcasting. Only four of the 145 document requests served on SoundExchange—and none of those referenced in iHeart's Motion—mention satellite radio. Furthermore, the Services' definition of "Digital Service" does not include satellite radio. *See Ehler Decl. Ex. A* at 1-2. Moreover, iHeart's Motion never mentions satellite radio or promotion to satellite radio. Yet, Sirius now seeks additional documents related to promotional efforts directed at satellite radio. Supporting its "reply," Sirius attaches over 20 pages of emails that (a) were never produced to SoundExchange; (b) demonstrate that Sirius has exactly the information it seeks to burden SoundExchange to collect; and (c) raise new issues offered for the first time in reply.

Sirius further seeks to broaden the relief sought by iHeart. Sirius seeks "*all documents* regarding the promotional effect of webcasting services." Sirius Reply at 4 (emphasis added). Not only was an almost identical request rejected by the Judges in past proceedings,<sup>4</sup> but iHeart has limited its own request for documents in its reply. iHeart Reply at 10. Sirius, however,

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<sup>4</sup> Order Granting in Part and Denying in Part the Motion of Digital Media Association and its Member Companies, NPR, Corporation for Public Broadcasting-Qualified Public Radio Stations and the Radio Broadcasters to Compel SoundExchange to Produce Discovery Relating to the Promotional Value of Airplay at 4, Dkt No. 2005-1 CRB DTRA (Mar. 28, 2006) (SDARS I) (denying a request for "all documents concerning the possibility that radio airplay, radio simulcasting, or non-interactive internet-only webcasting substitutes for record sales" as "too broad and nonspecific.").

requests different alternative relief, seeking “all such studies, analyses, surveys, presentations, or memoranda discussing any promotional effect of webcasting services.” Sirius Reply at 4.

Sirius does little to justify its improper reply beyond noting that when it filed its own Motion, it joined in iHeart’s and citing its “extensive experience” as the reason it may raise new arguments related to a type of service—satellite radio—not at issue in this proceeding and not mentioned anywhere in iHeart’s Motion.<sup>5</sup> Sirius Reply at 1. Neither is appropriate justification for making new arguments and requesting different forms of relief in a reply brief to which SoundExchange has no right to respond.

## **II. CONCLUSION**

For the aforementioned reasons, SoundExchange respectfully requests that the Judges strike NAB’s reply and Sirius’s reply.

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<sup>5</sup> Sirius’s own reply does not even attempt to argue that promotional efforts targeting airplay on satellite target webcasting plays as well. Rather, it attempts to conflate its satellite business with its webcasting business by referring to them jointly as “statutorily-licensed digital services.” Sirius Reply at 2-3. iHeart’s Motion, in contrast, is directed at “documents regarding the promotional effect of webcasting services.” iHeart Motion at 1.



Dated: December 2, 2014

Respectfully submitted,

By:

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Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, D.C.

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*In re*

DETERMINATION OF ROYALTY  
RATES AND TERMS FOR  
EPHEMERAL RECORDING AND  
DIGITAL PERFORMANCE OF SOUND  
RECORDINGS (*WEB IV*)

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) DOCKET NO. 14-CRB-0001-WR  
) (2016-2020)  
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**DECLARATION OF ROSE LEDA EHLER**

I, Rose Leda Ehler, declare as follows:

1. I am an attorney with Munger, Tolles & Olson LLP and am counsel for SoundExchange, Inc. ("SoundExchange") in Docket No. 14-CRB-0001-WR (2016-2020).
2. I respectfully submit this Declaration in support of SoundExchange's Motion to Strike Improper Reply Briefs of the National Association of Broadcasters and Sirius XM (the "Motion").
3. This Declaration is made based upon my personal knowledge.
4. On October 13, 2014, the Licensees' jointly served their First Set of Requests for Production of Documents to SoundExchange and Geo Music Group. Attached as **Exhibit A** to this Declaration is an excerpt from this first set of requests.
5. On November 12, 2014, counsel for SoundExchange met and conferred with counsel for iHeartMedia, Inc. ("iHeart"), Pandora Media, Inc. ("Pandora"), the National Association of Broadcasters ("NAB"), and Sirius XM Radio Inc. ("Sirius") regarding the

issues raised in iHeart's letter dated November 11, 2014. iHeart's letter is attached as **Exhibit B** to this Declaration.

6. SoundExchange responded to iHeart's correspondence and the meet-and-confer discussion by letter on November 13, 2014, attached as **Exhibit C** to this Declaration. This letter explains documents related to terrestrial radio are not directly related to SoundExchange's written direct statement and that SoundExchange would not separately search for them.

7. I have participated in multiple meet-and-confer discussions jointly with all of the Services, including one on November 18, 2014, that SoundExchange scheduled to discuss iHeart's production of documents which was joined by counsel for the other Services.

8. I have received numerous meet-and-confer letters and emails sent by one Service on behalf of several. I have attached an example of these emails as **Exhibit D** to this Declaration.

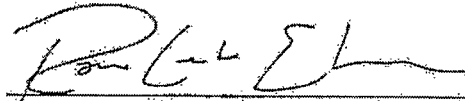
9. In one particular meet-and-confer discussion on November 17, 2014, counsel for NAB stated that the documents of NAB's witnesses' companies were "not in the possession, custody, and control" of NAB, that it "doesn't control members' documents," and that it "cannot compel them in the way that Pandora or iHeart" could. This position is also reflected in NAB's responses to SoundExchange's First Requests for Production of Documents, served on November 7, 2014. An excerpt from these responses is attached to this Declaration as **Exhibit E**.

10. Counsel for NAB called me on November 18, 2014, to clarify SoundExchange's position with respect to documents relating to terrestrial radio. I informed counsel for NAB that SoundExchange would not search separately for documents related

exclusively to terrestrial radio because such documents were not directly related to its written direct testimony, but it would not redact information related to terrestrial radio if the document was otherwise discoverable.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 2, 2014



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*Counsel for SoundExchange, Inc.*

Ex. A

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## **EXHIBIT A**

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
THE LIBRARY OF CONGRESS  
Washington, D.C.

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|------------------------------------|---|---------------------------------------|
| _____                              | ) |                                       |
| In re                              | ) |                                       |
|                                    | ) |                                       |
| DETERMINATION OF ROYALTY           | ) | Docket No. 14-CRB-0001-WR (2016-2020) |
| RATES AND TERMS FOR                | ) |                                       |
| EPHEMERAL RECORDING AND            | ) |                                       |
| DIGITAL PERFORMANCE OF             | ) |                                       |
| SOUND RECORDINGS ( <i>WEB IV</i> ) | ) |                                       |
| _____                              | ) |                                       |

**FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO  
SOUNDEXCHANGE, INC. AND GEO MUSIC GROUP FROM LICENSEE  
PARTICIPANTS**

Pursuant to Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq., 37 C.F.R. § 351.5, the Copyright Royalty Judges' Scheduling Order dated August 29, 2014, and the Parties' agreement concerning the discovery schedule as submitted to the Judges on July 29, 2014 (the "Discovery Schedule"), you are required to respond to the following Document Requests propounded by the licensee participants in this proceeding. Pursuant to the Discovery Schedule, your written responses and documents responsive to these Requests must be delivered to counsel for Pandora Media Inc., iHeart Media, Inc., the National Association of Broadcasters, Sirius XM Radio Inc., the National Religious Broadcasters Noncommercial Music License Committee, National Public Radio, Intercollegiate Broadcasting System, Inc., AccuRadio, and Harvard Radio Broadcasting Co., Inc. on or before November 7, 2014.

**DEFINITIONS**

1. "Digital Service" means any service providing users with access to digital audio transmissions or digital phonorecord deliveries of sound recordings and/or music videos, whether for free or by subscription, whether by streaming or download (either permanent or temporary),

whether offering a single type of music service or bundling together different music services (e.g., streaming and downloads), and whether available on a personal computer, television, receiver, set-top box, mobile/cellular phone, other mobile device (iPad, smartphone, tablet computer, laptop, etc.), or any other device or platform. Digital Services include but are not limited to services offering digital downloads, cloud services, providers of ringtones, mastertones and ringbacks, interactive streaming services (e.g., Rhapsody, Napster, Spotify, Mog, Rdio), all statutory, non-interactive, and customized varieties of internet radio/webcasting (e.g., Pandora, Slacker, Last.fm, radio station simulcasters, iHeart Radio, 8Tracks, Turntable.fm), music video providers (e.g., YouTube, Vevo), and mobile/cellular providers (e.g., Verizon, AT&T). Digital Services shall not include PSS's (e.g., Music Choice) or Business Establishment Services (e.g., Muzak, DMX, PlayNetwork).

2. "Document" or "Documents" shall have the same meaning as the term "document" in Rule 34(a)(1) of the Federal Rules of Civil Procedure and shall include all such items, including electronically-stored information, that would be subject to inspection and copying under that Rule, including the original and any non-identical copy of, any written, printed, typed, photographed or recorded materials, including but not limited to writings, notes, memoranda, agreements, contracts, drafts, mark-ups, redlined materials, proposals, offers, meeting minutes, agendas, reports, calendar or diary entries, drawings, graphs, charts, logs, photographs, phone records, tape recordings, computer disks, computer printouts or tape, email or any other data compilations from which information can be obtained or translated. The term "Document" also means every copy of a document where such copy is not an identical duplicate of the original, whether because of deletions, underlinings, showing of blind copies, initialing,



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## **EXHIBIT B**

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

SUMNER SQUARE  
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November 11, 2014

*Via Electronic Mail*

Glenn D. Pomerantz  
Munger Tolles & Olson LLP  
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Los Angeles, CA 90071

Re: SoundExchange's Deficiencies in Responses to Discovery Requests  
Docket No. 14-CRB-0001-WR (2016-2020) (*Web IV*)

Dear Glenn:

I am writing regarding SoundExchange's response to the webcasting services' First Set of Requests for Production of Documents and First Set of Interrogatories. SoundExchange's response included fewer than 6,000 documents comprising approximately 60,000 pages; this production shows custodial information for only 12 record label employees. The webcasting services, by comparison, have produced more than 27,000 documents comprising 138,140 pages, from more than 65 separate custodians. Based on our review thus far, and without limiting other deficiencies that we may raise as our review continues, it appears that SoundExchange's document production is deficient with respect to at least the categories set forth below, and that many of SoundExchange's objections are improper. Given the highly compressed schedule, we request a meet and confer by no later than end of day Wednesday, November 12, 2014, to discuss these concerns.

*Promotional Effect of Webcasting Services.* A number of SoundExchange's fact and expert witnesses claimed that webcasting services do not promote other sources of music revenues, such as song and album sales, but instead substitute for such sales.<sup>1</sup> Based on these factual assertions, among others, SoundExchange's witnesses have argued that the non-interactive webcasting services at issue in this proceeding are "converging" with on-demand

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<sup>1</sup> See Kooker at 18-21; Wheeler at 18-19; Rubinfeld ¶¶ 21, 138, 161; Blackburn ¶¶ 89-109.

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services,<sup>2</sup> and that the agreements for such on-demand services are therefore an appropriate benchmark for the non-interactive services at issue here.<sup>3</sup> The webcasting services asked a number of requests and interrogatories directly related to this testimony.<sup>4</sup> Among other things, these requests sought documents regarding studies of promotion and substitution, the financial and other resources that the labels devote to promotion, marketing and promotion plans for top-grossing artists, and other documentary support for the broad statements made in the testimony of SoundExchange's witnesses.

SoundExchange's response appears to contain virtually none of this requested information. For example, although we understand that Monte Lipman (UMG), Greg Thompson (UMG), Charlie Walk (UMG), Joel Klaiman (Columbia Records/Sony), Lee Leipsner (Columbia Records/Sony), Joe Riccitelli (RCA Records/Sony), Mike Easterlin (Warner), Andrea Ganis (Atlantic Records/Warner), Peter Gray (Warner), and Julie Greenwald (Warner) oversee promotion for the various record labels, SoundExchange has produced *zero* custodial documents total for these individuals. More generally, just a tiny number of documents in SoundExchange's production appear responsive to the requests involving this category. SoundExchange's objections (at 22) state that it "will conduct a reasonable search for additional documents where such documents would most likely be found at the corporate level of the three major record companies and agrees to produce those documents related to the substitutional or promotional effect of streaming music services in the places kept in the ordinary course of business to the extent directly related to SoundExchange's written direct testimony." At a minimum, and without prejudice to other objections we have with SoundExchange's position that it will search for documents only at the "corporate level," we expect SoundExchange to perform searches of the individuals listed above and the record labels' promotions departments for documents responsive to the webcasting services' requests. Moreover, we expect this search to include the promotional effects of terrestrial radio, which is inextricably intertwined with the radio simulcasting services at issue in this proceeding.

*Record Label Costs and Revenues.* SoundExchange's fact and expert witness have also put the record labels' costs and revenues squarely at issue. For example, SoundExchange's witnesses from the record labels have argued that any rates from webcasting must compensate them for their "large capital investment," and have provided high-level totals of these expenditures.<sup>5</sup> These witnesses also have claimed that their revenues are declining due to

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<sup>2</sup> See Kooker 15-18; Rubinfeld ¶¶ 12, 21, 52-74, 140-41, 145, 160-61; Blackburn ¶¶ 13, 16, 45-46, 96, 97-105.

<sup>3</sup> See Harrison ¶¶ 17-21; Rubinfeld ¶¶ 21, 37, 157-75; Lys ¶¶ 25-41.

<sup>4</sup> See Doc. Req. Nos. 14-16, 28-29, 30, 49, 56-58 & Interrog. No. 7.

<sup>5</sup> Kooker at 3-6; see Harrison at 6-9; Harleston at 4-14.



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various changes in the industry.<sup>6</sup> SoundExchange's experts have likewise emphasized the importance of compensating copyright owners for their costs and investment, and have argued that revenue streams are diminishing due to industry changes.<sup>7</sup> The webcasting services asked a number of requests and interrogatories directly related to this testimony. Among other things, these requests sought financial statements from the record labels showing their costs and revenues, the amounts spent on certain categories of activities, analyses of digital costs and cost structure, and documents regarding trends affecting revenues.<sup>8</sup>

SoundExchange's response provides some data regarding the record labels' revenues, but appears to provide nothing on their costs. SoundExchange's objections state (at 20) that it will search for "non-privileged documents maintained in the ordinary course of business sufficient to show the witnesses' companies' annual operating costs and projections, if any such documents exist, to the extent they are directly related to SoundExchange's written direct statement." This objection-laden statement provides little assurance that requested documents related to the record labels' costs will be forthcoming, but it is even more troubling that these documents were not in SoundExchange's initial disclosures or its initial production, given that SoundExchange's own witnesses put these costs at issue, and SoundExchange has therefore known for some time these documents would need to be produced.

*Evaluation of Warner/iHeartMedia Deal.* SoundExchange's experts rely on the agreement between Warner and iHeartMedia.<sup>9</sup> Professor Rubinfeld relies on this agreement in his analysis, stating that it is one of the agreements that is "informative" for purposes of determining rates.<sup>10</sup> Ron Wilcox of Warner describes this agreement in detail, and also discusses Warner's motivations for entering this agreement.<sup>11</sup> The webcasting services accordingly asked for documents regarding the negotiation of the Warner-iHeartMedia agreement and Warner's internal evaluation of the deal.<sup>12</sup>

Based on our review, SoundExchange's production contains documents that were exchanged between Warner and iHeartMedia, but appears to exclude documents reflecting internal deliberations within Warner, including any analyses of Warner's financial expectations and other rationales for entering the agreement. SoundExchange's objections state (at 40) that it

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<sup>6</sup> See Kooker at 6-10; Harrison at ¶¶ 11-16; Harleston at ¶¶ 35-38.

<sup>7</sup> See Rubinfeld ¶¶ 46, 96, 138; Blackburn ¶¶ 42-45 & n.44.

<sup>8</sup> See Doc. Req. Nos. 11-13, 29-30, 52-54, 57, 65, 97, 99, 107 & Interrog. Nos. 6 & 7.

<sup>9</sup> Rubinfeld ¶¶ 22-24, 84, 115, 139, 150, 162, 164, 176-87; 229-32; Lys at 3 n.1, App. B.

<sup>10</sup> See Rubinfeld ¶¶ 176-187.

<sup>11</sup> See Wilcox at 7-12.

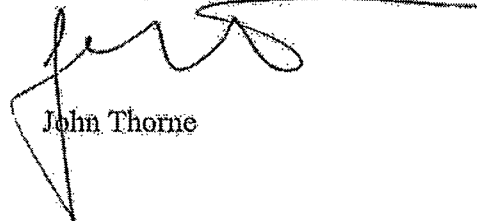
<sup>12</sup> See Doc. Req. Nos. 7, 37-39.

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November 11, 2014  
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"will conduct a reasonable search for additional documents sufficient to show WMG's value of the terms of the agreement between iHeartMedia and WMG as expressed in documents exchanged during negotiations of that agreement." But documents "exchanged during negotiations" are not the relevant or appropriate universe. Mr. Wilcox's testimony states (at 12) that "WMG agreed to enter into the Clear Channel agreement because it believed the deal provided a unique opportunity for WMG to obtain far greater consideration for the use of WMG content than WMG would obtain if Clear Channel used that content pursuant to the statutory license." We are entitled to all documents regarding Warner's analysis of the agreement, regardless of whether that analysis (or those documents) were exchanged with iHeartMedia.

Pandora, NAB, and Sirius XM have authorized us to say that they join this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "John Thorne", with a long horizontal flourish extending to the right.

John Thorne



[illegible][illegible]

## **EXHIBIT C**

MUNGER, TOLLES & OLSON LLP

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November 13, 2014

RONALD L. OLSON<sup>1</sup>  
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GEORGE M. GARVEY  
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STEPHEN M. KRISTOVICH  
JOHN W. SPIEGEL  
TERRY E. SANCHEZ  
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LISA J. DEMSKY  
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C. DAVID LEE  
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BRETT J. RODDA  
SEAN ESKOVITZ  
FRED A. ROWLEY, JR.  
KATHERINE M. FORSTER  
BLANCA FROMM YOUNG  
RANDALL G. SOMMER  
MARIA SEFERIAN  
MANUEL F. CACHAN  
ROSEMARIE T. RING  
TODD J. ROSEN  
TRUITT, DO  
MELINDA EADES LEMOINE  
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GRANT A. DAVIS-DENNY  
JONATHAN H. BLAVIN  
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BENJAMIN J. MARO  
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RAY S. SEILIE  
NICHOLAS C. SOLTMAN  
ADAM I. KAPLAN  
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WILLIAM J. EDELMAN  
KEVIN L. BRADY  
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WRITER'S DIRECT CONTACT  
(415) 512-4071  
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Rose.Ehler@mto.com

VIA ELECTRONIC MAIL ONLY

John Thorne  
Kellogg, Huber, Hansen,  
Todd, Evans & Figel, PLLC  
Sumner Square  
1615 M Street, NW  
Suite 400  
Washington, DC 20036-3209

Re: SoundExchange's Responses to Discovery Requests  
Dkt No. 14-CRB-0001-WR (2016-2020) (Web IV)

Dear Counsel:

We write in response to your letter regarding SoundExchange's Responses to Discovery Requests dated November 11, 2014, and to follow up on our meet and confer discussion held yesterday.

As an initial matter, we note that you have mischaracterized the productions of each party. Notably, your letter fails to acknowledge the ample disclosures that SoundExchange made on October 10<sup>th</sup>. The rules contemplate fulsome initial disclosures, and by providing those SoundExchange has enabled the services to respond to its direct testimony immediately. By contrast the services' initial disclosures were sparse. Further, the massive number of documents and pages from your and the other services' production in response to our document requests

November 13, 2014

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includes duplicate and lesser included emails. In short, your numbers do not tell an accurate story here.

Regarding your specific complaints, we will address each in turn below.

*First*, we disagree with your contention that our productions related to the “promotional effect of webcasting services” were deficient.

We have produced multiple studies of promotion and substitution from each of Sony Music Entertainment (“Sony”), Warner Music Group (“WMG”) and Universal Music Group (“UMG”). We further agreed to produce (and in some cases have already produced) documents related to the financial and other resources spent on marketing and promotion, including those marketing and promotional plans for the top 10 grossing projects from Sony and UMG, where such plans existed in a final form. Additional WMG plans will be forthcoming in a supplemental production Friday, November 14<sup>th</sup>. These plans give ample detail as to the promotional and marketing efforts undertaken by the record companies on behalf of their artists, including but not limited to efforts targeted at music streaming services and terrestrial radio. These plans often include the impact of the promotional efforts expended. We also produced detailed (invoice level) information of marketing spends for several of these artists that give the utmost detail on what is done and spent to promote and market an artist in response to your requests.

We will not separately look for terrestrial radio documents. Documents related *only* to terrestrial radio are not directly related to SoundExchange’s written direct statement. We will not redact or segregate information on promotion related to terrestrial radio, but we will not look separately for them either. Additional searches for documents related to terrestrial radio are unduly burdensome in particular because such documents are not “directly related” to SoundExchange’s direct statement.

We believe searching for documents at the “corporate level” is reasonable giving the overwhelming burden of searching the scores of subsidiary record labels at offices all across the country for all of their documents. Licensees literally asked for *all* subsidiary label documents and are only now attempting to limit that in scope by naming specific individuals. The NAB has refused to look to even its witnesses’ companies for documents, whereas SoundExchange has gone well beyond its own files and imposed the burden of discovery on its witnesses’ companies. For example, in the NAB’s Request No. 8, we asked for documents relating to a statement made by Steven Newberry, but the NAB objected that the documents are not in their control. Instead, the NAB agreed only to produce “documents reviewed or relied upon by Mr. Newberry in making the quoted statements.” Similarly, when we asked for NAB members’ financial projections, they refused to give us anything because the “request by its terms also seeks documents that are not in the possession, custody, or control of NAB.” It cannot be the case that SoundExchange must produce documents from its witnesses’ companies individual labels, but the NAB does not even produce documents from its witnesses’ companies. We request that NAB take consistent positions.

November 13, 2014

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Nevertheless, in the name of compromise, we will make a reasonable attempt to obtain and produce documents sufficient to show the amounts spent at the label level for the categories of marketing and promotional costs and expenditures identified in the document requests listed in footnote 4 of your letter.

*Second*, we disagree that our production of documents related to “record label costs and revenues” was deficient.

Your letter incorrectly states that no documents related to costs were produced. As you stated in our meet and confer, you have reviewed the Bates numbered documents that we identified for you which include P&Ls and other documents showing costs, including costs for Interscope records and detailed costs for artist advances. Again, we note that the NAB has not furnished similar data and appears to join in your letter despite its deficiencies in production. If your position is that we must produce documents at the same level of detail that iHeartMedia and Pandora have, we, of course, expect that each party will likewise comply with that protocol. Any different position puts SoundExchange at a disadvantage.

As agreed, we will review the documents that you have agreed to identify for us listing iHeartMedia and Pandora’s detailed costs and will respond with whether and to what extent we believe it would be appropriate to provide similar data from the three major record labels.

*Third*, we disagree with your claim that documents related to WMG’s internal “evaluation of the Warner/iHeartMedia deal” necessarily must be produced.

Dr. Rubinfeld did not examine internal analyses or engage in any analysis of the specific intentions or expectations of the parties. Mr. Wilcox discusses the agreement as executed in October 2013. His testimony deals with those terms of the final executed agreement. You quote a single, non-specific sentence that at a very high level of generality describes Warner’s position that “the deal provided a unique opportunity to WMG to obtain far greater consideration for the use of WMG’s content than WMG would obtain if Clear Channel used that content pursuant to the statutory license.” Mr. Wilcox then outlines the terms of the deal as executed and explains why each is valuable. Accordingly, the agreement itself is clear and sufficient support for this statement.

Nonetheless, we have gone to great lengths to give you and the other participants documents related to Warner’s negotiations and negotiating position with regard to the iHeartRadio deal. Our objection here is primarily one of burden. We have already produced thousands of emails that are evidence of Warner’s expectations, beliefs, and position – as these expectations, beliefs, and positions were expressed to iHeartMedia. To the extent that you continue to believe that you are entitled to more on the grounds that you are entitled to explore Ron Wilcox’s views on Warner’s expectations, we propose to review and produce Ron Wilcox’s non-privileged internal emails from the month preceding execution of the deal. Please advise us if this is an acceptable compromise.



MUNGER, TOLLES & OLSON LLP

November 13, 2014

Page 4

Sincerely,

/s/ Rose Leda Ehler

Rose Leda Ehler

Cc: Counsel for Pandora, NAB, SiriusXM





## **EXHIBIT D**

---

**From:** Larson, Todd <Todd.Larson@weil.com>  
**Sent:** Tuesday, November 18, 2014 9:27 AM  
**To:** Ehler, Rose; Choudhury, Anjan  
**Cc:** Paul.Fakler@arentfox.com; Jackson.Toof@arentfox.com; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM; Collins, Reed; CMills@wileyrein.com; MPacella@wileyrein.com; bjooseph@wileyrein.com; kabin@wileyrein.com; msturm@wileyrein.com; eleo@khhte.com; jthorne@khhte.com; jebin@akingump.com; LeMoine, Melinda; Klaus, Kelly; Pomerantz, Glenn; Olasa, Kuruvilla  
**Subject:** RE: Open discovery items

Rose – since we'll all be on the phone anyway, can we add the question re: agreements/account statements/negotiation docs to the agenda for the 1:30 call if there's time for it?



Todd Larson  
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New York, NY 10153  
[todd.larson@weil.com](mailto:todd.larson@weil.com)  
+1 212 310 8238 Direct  
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+1 212 310 8007 Fax

---

**From:** Ehler, Rose [mailto:Rose.Ehler@mto.com]  
**Sent:** Saturday, November 15, 2014 12:07 PM  
**To:** Larson, Todd; Anjan.Choudhury@mto.com  
**Cc:** Fakler, Paul M. (Paul.Fakler@arentfox.com); Toof, Jackson (Jackson.Toof@arentfox.com); Cunniff, Martin (Cunniff.Martin@ARENTFOX.COM); Mills, Chris (CMills@wileyrein.com); Pacella, Mark (MPacella@wileyrein.com); bjooseph@wileyrein.com; kabin@wileyrein.com; msturm@wileyrein.com; Leo, Evan T. (eleo@khhte.com); jthorne@khhte.com; Rich, Bruce; Perelman, Sabrina; Ebin, Jacob; Collins, Reed; LeMoine, Melinda; Kelly.Klaus@mto.com; glenn.pomerantz@mto.com; Olasa, Kuruvilla  
**Subject:** RE: Open discovery items

Hi Todd,

In response to your email regarding open discovery items:

Regarding the Dr. McFadden initial disclosures, my understanding is that we have produced all the data in the raw form received by Dr. McFadden. The .dta files include all the data from the survey participants in the form he received it. SoundExchange produced native files of these computer programs in a supplemental production on November 6, 2014. The documents produced were what Dr. McFadden relied upon.

Regarding the native version of SNDEX0051684, this file was sent to you in SoundExchange's production, along with other documents that were withheld for confidentiality reasons, on November 4, 2014. Please note, because this was a replacement native, it was sent within the same production zip file, but may have been missed because it was not included in the database load files.

Regarding the processing error slipsheets, we understand your questions and are researching the issue further.

We are, of course, happy to discuss your questions regarding license agreements and account statements as well as deposition scheduling. Is there a time on Tuesday during normal business hours (pacific time) that works for you all?

Sincerely,  
Rose

Rose Leda Ehler | Munger, Tolles & Olson LLP  
560 Mission Street | San Francisco, CA 94105  
Tel: 415.512.4071 | [Rose.Ehler@mto.com](mailto:Rose.Ehler@mto.com) | [www.mto.com](http://www.mto.com)

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---

**From:** Larson, Todd [<mailto:Todd.Larson@weil.com>]  
**Sent:** Friday, November 14, 2014 12:48 PM  
**To:** Ehler, Rose; Choudhury, Anjan  
**Cc:** Fakler, Paul M. ([Paul.Fakler@arentfox.com](mailto:Paul.Fakler@arentfox.com)); Toof, Jackson ([Jackson.Toof@arentfox.com](mailto:Jackson.Toof@arentfox.com)); Cunniff, Martin ([Cunniff.Martin@ARENTFOX.COM](mailto:Cunniff.Martin@ARENTFOX.COM)); Mills, Chris ([CMills@wileyrein.com](mailto:CMills@wileyrein.com)); Pacella, Mark ([MPacella@wileyrein.com](mailto:MPacella@wileyrein.com)); [bjoseph@wileyrein.com](mailto:bjoseph@wileyrein.com); [kablin@wileyrein.com](mailto:kablin@wileyrein.com); [msturm@wileyrein.com](mailto:msturm@wileyrein.com); Leo, Evan T. ([eleo@khhte.com](mailto:eleo@khhte.com)); [jthorne@khhte.com](mailto:jthorne@khhte.com); Rich, Bruce; Perelman, Sabrina; Ebin, Jacob; Collins, Reed  
**Subject:** Open discovery items

Rose and Anjan,

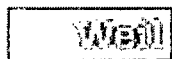
I write regarding several open discovery issues.

1. *Rubinfeld/Kooker Deposition Dates.* When we last spoke, you indicated that you would check on deposition dates for Professor Rubinfeld other than 12/8 and for Mr. Kooker other than 11/19. Please let us know as soon as you can what other dates are available. Please let us know as well whether 12/4 will work for the Shapiro deposition.
2. *McFadden Initial Disclosures.* After reviewing all of the documents referenced in your October 30, 2014 letter regarding the disclosures related to the written direct testimony of Daniel L. McFadden, we continue to believe SoundExchange's production is deficient. At a minimum, you have still not produced the raw data collected from the survey participants, nor have you produced the computer code used to convert these raw data into the data files "BRTG0002\_OUTPUT\_weighted.dta" (SNDEX0018269) and "BRTG0002\_OUTPUT\_weighted.dta" (SNDEX0018378). Please promptly produce these and any other materials relied upon by Dr. McFadden that have not previously been produced in native electronic format with their original filenames and file structure.
3. *Rubinfeld Initial Disclosures.* We have not received the native version of SNDEX0051684 that was promised in your letter of October 30, 2014. Please send us that file promptly.
4. *"Processing Error" Documents.* Rose's email of November 11, 2014 raises several questions. You suggest you produced these files as kept in the ordinary course of business by WMG, and that the "processing error" slipsheets were inserted by your vendor where attachment records were empty. Finally, you note that there are "companion" emails with the missing attachment located elsewhere in the production, and provide three examples. It's not clear to us what a "companion" email is, or how, if the email with attachment is duplicated elsewhere in the production, it was not available in these instances. Regardless, please confirm that for each of the "processing error" documents (not just a

sample of three), the missing attachment has in fact been produced elsewhere in the production. If not, please promptly gather and produce the missing attachments from WMG. That the missing attachments were for some reason not included in the documents provided by WMG is not sufficient reason to withhold their production if they in fact exist.

5. *SoundExchange's Production of License Agreements and Account Statements.* In addition to the technical issues above, we would like to schedule a call to discuss SoundExchange's responses and objections to Requests 5, 7, and 8 of the licensee participants' first request for production of documents and your response to Interrogatory 1 from the licensee participants. It is not clear to us what license agreements (and/or categories of license agreements) SoundExchange is agreeing to produce and which it is not. More specifically, it appears that you may be limiting your production solely to service categories that SoundExchange deems relevant to the proceeding, but you also indicate that you are producing full-length audio and video streaming agreements; it is not clear to us how these two representations interrelate and whether you only intend to produce a particular subset of audio and video streaming agreements. Please let us know a time that would work on your end to discuss this issue – preferably as soon as possible.

Thanks.



**Todd Larson**  
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**EXHIBIT E**

Before the  
**COPYRIGHT ROYALTY JUDGES**  
**LIBRARY OF CONGRESS**  
Washington, D.C.

In The Matter Of:

Determination of Royalty Rates  
for Digital Performance in Sound  
Recordings and Ephemeral  
Recordings (Web IV)

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)  
) **14-CRB-0001-WR (2016-2020)**  
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)  
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**RESPONSE OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO  
SOUNDEXCHANGE'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b), the National Association of Broadcasters ("NAB") hereby objects and responds to the First Set of Requests for Production of Documents propounded by SoundExchange, Inc. ("SoundExchange") in the above-referenced proceeding.

**GENERAL RESPONSES AND OBJECTIONS**

1. NAB's production is made subject to and without waiver of any objection as to the competency, relevancy, materiality, privilege, use, or admissibility as evidence or for any other purpose, of any information, material, or documents identified, produced, or disclosed, or of the subject matter thereof, in response to SoundExchange's requests in any proceeding, including Docket No. 14-CRB-0001-WR (2016-2020), or any subsequent proceedings. Neither the offer to search for and produce responsive documents to any request for documents nor the production of any document in response to any request means or indicates that the scope of the request is consistent with the discovery permitted in this proceeding, that NAB agrees or otherwise acknowledges that the document is relevant or admissible, that NAB agrees with or

insofar as they define NAB to include "the witnesses and experts submitting testimony in this proceeding as part of the written direct case of the National Association of Broadcasters."

Neither the witnesses nor their employers are components of NAB. Except as may otherwise be specified, NAB will search for and produce responsive documents located only within the possession, custody, and control of NAB from NAB employees who are reasonably likely to have responsive documents that are directly related to NAB's written direct statement.

12. NAB objects to the requests, including all Definitions and Instructions, to the extent that they seek documents "previously within [NAB's] knowledge, possession, custody, or control." NAB cannot and will not produce documents or information about which it has no knowledge or over which it has no possession or control.

13. NAB objects to the requests, including all Definitions and Instructions, to the extent that they purport to require production of documents from any member of NAB or any other person or entity that is not a participant in this proceeding or who has not provided witness testimony in this proceeding and further objects to the requests, including all Definitions and Instructions, to the extent that they seek from such a person or entity information that is not in the possession, custody, or control of NAB. NAB has thousands of members, including thousands of radio station members nationwide. NAB does not have possession, custody, or control of their documents and information, and such documents and information cannot be requested or produced by NAB. Such requests are unreasonable, overbroad, unnecessarily complex, unduly burdensome, oppressive, and harassing.

14. NAB objects to the requests, including all Definitions and Instructions, to the extent that they purport to require NAB to produce documents in the possession, custody, or control of iHeartMedia, Inc. ("iHeartMedia") or documents otherwise related to iHeartMedia.

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on December 2, 2014, I caused a copy of  
**SOUNDEXCHANGE'S MOTION TO STRIKE "REPLY" BRIEFS IN SUPPORT OF**  
**iHEARTMEDIA'S MOTION FILED BY NATIONAL ASSOCIATION OF**  
**BROADCASTERS AND SIRIUS XM** to be served via electronic mail and via first-class,  
postage prepaid, United States mail, to the Participants as indicated below:

### *Participants*

|  |  |
|--|--|
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